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TREATIES AND EXECUTIVE AGREEMENTS:
HISTORICAL DEVELOPMENT AND CONSTITUTIONAL
INTERPRETATION

by

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The recent proposal to amend the Constitution known as the Bricker Amendment concerns a most vital matter for the nation: its relations with foreign states.

In order to estimate the merits and demerits of the Bricker Amendment it is necessary to get acquainted with the historical development and the constitutional interpretation in the field of international arrangements of the United States. The present observations aim at the presentation of this matter down to the Bricker Amendment. The Amendment itself and the discussion it aroused should be treated in a separate article.

I. THE CONCEPT OF TREATY IN INTERNATIONAL LAW AND
AMERICAN PRACTICE

A. General Observations

The arrangements between different states, relating to all the multifarious aspects of international intercourse, are known under various names, such as treaties, conventions, protocols, declarations, acts, *modi vivendi*, etc. No classification of those arrangements has proved to be satisfactory, and although, for example, the term "treaty" purports generally to designate a more important and multilateral international arrangement and the "*modus vivendi*", a temporary and bilateral agreement of secondary importance, no distinct and clear cut line can be drawn between them.¹

However, it should be mentioned that according to a modern trend in international law two groups of treaties should be distinguished: the first embracing the "law making treaties" concluded for the purpose of laying down general rules of conduct among a considerable number of states, the second, treaties concluded for any other purpose.² This classi-

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¹ For some definitions and classifications, see e.g., Vattel, *LAW OF NATIONS* (Dublin ed. 1792), 296; Pradier-Fodere, 2 *Droit Int'l* 473 (1885); Bonfils-Fauchille, 1 *Droit Int'l* 290 (1926); Hackworth, 5 *Digest of Int'l L.* 1 (1940-44); OPPENHEIM, *INT'L LAW* (1947), 791-792; HARVARD RESEARCH IN INT'L L., Art. 1, p. 686.

² OPPENHEIM, *INT'L LAW* (1947), 797.

fication has been clearly established by such authors as Professor Scelle, who distinguishes between "traites-lois" and "traites-contrats", and discusses the former in a chapter significantly entitled "International Legislation".³ Professor Hudson has likewise published his collection of the texts of various multipartite international arrangements under the title "International Legislation".

B. The Treaty-Making Power

In past centuries, most frequently the head of the state had the authority to conduct all the foreign relations of his nation. In some countries, however, the consent of the parliament was proclaimed at an early date as necessary for the more important international acts. This, for example, was the case in Poland (Constitution "Nihil Novi", 1505). Up to the last World War, the unlimited treaty making power of the head of the state survived only in a few quasi-dictatorial states, such as Japan or Siam. Theoretically, Great Britain still belongs to this category of states, but in practice, the King will never sign any treaty unless the consent of Parliament is given.⁴

In modern states, the head of the state usually has the treaty making power, but international arrangements of particular importance ordinarily specified in the constitution require the consent of the legislative body prior to ratification. In Poland, for example, the provisions of the Constitution of 1935, similar to the relevant provisions of the previous Constitution of 1921, vested in the President of the Republic the power to conclude and ratify agreements with other states, but Art. 52 provided that some types of treaties require the consent of the Legislative Chambers.

Title IV of the French Constitution of 1946, dealing with diplomatic treaties, sets forth in Art. 25 a most modern principle: "Diplomatic treaties duly ratified and published shall have the force of law even when contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure their ratification;" and Art. 27 requires the consent of the legislative bodies to a few important types of treaties.⁵

C. The American System

In the United States Constitution the treaty power is vested by Art. II, Sec. 2, Par. 2, in the President, subject to the advice and consent of the Senate. There are, however, several other provisions dealing with inter-

³ GEORGE SCELLE, *DROIT INTERNATIONAL PUBLIC* (1944).

⁴ GEORGE SCELLE, *op. cit.*, 477.

⁵ For discussion of the French Constitution, see L. Preuss, *The Relation of International Law to Internal Law in the French Constitutional System*, 34 A. J. Int'l L. 641 (1950).

national arrangements. Article I, sec. 10, withdraws from the several states the power to enter into international arrangements. The first paragraph of Art. III, sec. 2, grants to the Federal Courts the jurisdiction over cases arising under treaties made by the United States; and the second paragraph of Art. VI makes the treaties, together with the Constitution and the Federal laws, the supreme law of the land.

Some of the framers of the Constitution promoted the idea that the treaty making power be vested exclusively in the Senate.⁶ Fortunately, this procedure, which would be extremely cumbersome and long, would hinder the development of international relations of the United States and would be contrary to the practice of other states, was not adopted. A motion suggesting the participation of the House of Representatives in the treaty making procedure was defeated in the Constitutional Convention of 1787.⁷

The provisions of the Constitution vesting the treaty making power in the President and the Senate were, however, interpreted by the House of Representatives, in the early days of the union, as leaving it also some authority in carrying out the stipulations of the treaties by granting the necessary appropriations. This idea was expressed in the resolution of April 30, 1796, adopted during the debates on the Jay Treaty with Great Britain of 1794.⁸

An interesting discussion ensued in the House of Representatives concerning the treaty with Russia providing for the cession of Alaska. The consent of the Senate was given, and the proclamation of President Johnson declaring that the treaty be observed took place on June 20, 1867, but the House of Representatives split on the question of whether the appropriation of \$7,200,000 for such a worthless territory should be made. After prolonged discussions, the following resolution was adopted: ". . . it being necessary that the consent of Congress shall be given to the said treaty before the same shall have full force and effect . . . the assent is hereby given to the stipulations of said treaty."⁹

The Senate refused to accept the viewpoint of the House of Representatives, asserting that the consent of the Congress is not necessary for the payment of money and the incorporation of territory, when provided for in a treaty. To settle the question, a mixed conference committee was established and accepted the following resolution: ". . . whereas said stipulations cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary; there-

⁶ CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* (1916), 24.

⁷ J. R. Morford, *Constitutional Amendment as to the Ratification of Treaties. For the Proposed Amendment*. 30 A. B. A. J. 605 (1944).

⁸ 2 WHARTON'S INTERNATIONAL LAW DIGEST (1887), 19.

⁹ WHARTON, *ibid.*, 21.

fore, be it resolved . . . that there be . . . appropriated . . . \$7,200,000 in coin. . . ." This resolution was accepted by the House.¹⁰

After ratification, the treaty is either immediately binding upon the agencies of the contracting states, or requires a separate act of the legislature, according to the constitutional requirements of the contracting parties. The first system, consistent with the modern concepts of the organization of international life, has been adopted by the recent French Constitution;¹¹ the second is still applied in many countries, particularly in Great Britain. In the United States there has been established a distinction between the "self-executing" and "non self-executing" treaties.

The answer to the question of whether a treaty, entered into without abiding by the constitutional procedure of a state is binding or not, is far from being uniform.

It often has been contended that unconstitutional treaties have no binding power. Hyde stated in 1922 that an unconstitutional treaty must be regarded as void,¹² but amended his assertion in 1945 to admit of some exceptions.¹³ Scelle shares his opinion.¹⁴ Oppenheim writes: "Such treaties . . . as violate constitutional restrictions, are not real treaties, and do not bind the state concerned. . . ."¹⁵

According to the Harvard Research in International Law,¹⁶ a state is not bound by a treaty made on its behalf by a body not competent under its law to conclude the treaty; however, a state may be responsible for an injury resulting to another state from reasonable reliance on the power of such a body.

The majority of the American and British students of the problem, however, properly assert that the constitutional requirements of the contracting parties are their internal matter with no bearing upon the validity of the international arrangement entered into by their agents. McNair writes that it seems more reasonable to say that if one of the parties, in concluding a treaty, produces an instrument "complete and regular on the face of it," although in fact constitutionally defective, the other party is entitled to assume that the instrument is in order.¹⁷ Similarly, Fitzmaurice submits that the only rule which is both logical and readily applicable is to the effect that states have no concern with the other's laws and constitutions.¹⁸

¹⁰ *Ibid.*

¹¹ See Note 5.

¹² 2 International Law 9 (1922).

¹³ 2 International Law 1385 (1945).

¹⁴ *Op. cit.*, note 3, 475.

¹⁵ Edited by Lauterpacht (1947), 791-792.

¹⁶ Art. 21, 29 A. J. Int'l L. Supp. 653, 992 (1935).

¹⁷ "Constitutional Limitations Upon the Treaty Making Power," in ARNOLD, TREATY MAKING PROCEDURE (1933).

¹⁸ *Do Treaties Need Ratification?*, Brit. Y. B. Int'l L. 113, 136 (1934).

In conformity with this theory, Hackworth stated that in international law the head of the government is entitled to speak for the state, and if the President of the United States enters into an obligation with a foreign government, that foreign government is entitled to rely upon it.¹⁹ If the obligation is violated, it is a violation of an international obligation.

D. New Trends in the United States Before the Bricker Amendment

The exclusion of the House of Representatives from the treaty making procedure has often been criticized and a trend for a constitutional amendment eliminating the requirement of two-thirds approval by the Senate and providing for the House to share in the responsibility for the conclusion of international arrangements, originated early in the twentieth century. Prof. Borchard, who stated that such a change of the relevant provisions of the Constitution has the moral support of the Supreme Court, asserted that this movement began with Secretary Hay's denunciation of the Senate for substituting the word "treaty" for the word "special agreement" in the projected arbitration treaties of 1904, and that it received further impetus after the defeat of the Versailles Treaty by the Senate.²⁰ This decision of the Senate, excluding the United States from participation in the peaceful development of international life and institutions, for a long time barred the country from joining the whole system of the League of Nations.²¹ Prof. Colegrove pointed out in connection with the Versailles Treaty that "under the two-thirds rule, a minority of bitter partisans and personal enemies of the President were able to sabotage the peace system which America had persuaded Europe and America to accept,"²² in spite of the fact that they were aware that "eighty per cent of the people" of the U. S. were for it.²³

The Senate's dealing with treaties has met with sharp criticism on the part of different scholars and statesmen, irrespective of the case of the League of Nations. Dean Wigmore, in an article entitled "The Federal Senate's Neglect of the Nation's International Interests,"²⁴ quoted a special message sent by President Coolidge for the third session of the 71st Congress, asking for prompt action on ten treaties (besides the pending Permanent Court Treaty). Two of these treaties had been pending before the Senate for five and six years, respectively, three for 3 years, three

¹⁹ Hearings before the Subcommittee of the Committee of Commerce, U. S. Senate, Nov. 29, 1944, S1385, p. 230.

²⁰ *Shall the Executive Agreement Replace the Treaty?*, 38 Am. J. Int'l L. 647 (1944).

²¹ Shortly before the Second World War, the United States joined some institutions established under the auspices of the League of Nations.

²² THE AMERICAN SENATE AND WORLD PEACE (1944), 90.

²³ *Ibid.*, at p. 75.

²⁴ 26 Ill. L. Rev. 794 (1932).

for 2 years, and one for 1 year. Furthermore, nine other international compacts, not technically treaties, to which the President called the attention of the Senate, were waiting the action of the latter. It must be admitted that the prolonged procedure before the Senate or lack of any action on its part was extremely obstructive to the development of the international relations of the country.

Prof. Borchard,²⁵ an ardent promoter of the Senate's constitutional prerogatives, asserted that up to 1928, only 15 treaties have been rejected by the Senate²⁶ and about 160 amended. He admitted, however, that 47 treaties were not acted upon at all by the Senate.

The suggestion of a constitutional amendment had some very ardent partisans, such as the late Sol Bloom, former Chairman of the Committee on Foreign Affairs of the House of Representatives,²⁷ and Senator E. Kefauver.²⁸

II. EXECUTIVE AGREEMENTS

A. Historical Remarks

In the United States, two types of international arrangements should be distinguished: treaties and executive agreements. Weinfeld²⁹ asserted that the framers of the Constitution were well acquainted with Vattel's distinction between major and minor international arrangements.³⁰ In the Constitution, Art. I, Sec. 10, which deals separately with "treaties, alliances or confederations" and "agreements or compacts", easily permits the inference that the conclusion of executive agreements has been expressly authorized by the Constitution, and executive agreements have been utilized since the first years of the existence of the United States. Even the partisans of the important role of the Senate in treaty making, like Prof. Borchard, admit that executive agreements are absolutely necessary in the routine of administration. It has been pointed out that down to the end of the Second World War the United States more often employed the executive agreement procedure than that of the formal treaty in its international arrangements.³¹

²⁵ *Op. cit.*, note 20, on p. 637.

²⁶ See W. S. HOLT, *TREATIES DEFEATED BY THE SENATE* (1933), 7.

²⁷ "Treaty Making Power: Fourteen Points Showing why the Treaty Making Power Should be Shared by the House of Representatives," compiled and prepared by Sol Bloom (booklet edited in 1944).

²⁸ *The House of Representatives Should Participate in Treaty Making*, 19 Tenn. L. Rev. 44-51 (1945).

²⁹ Report of the Researches, 3 Univ. of Chi. L. Rev. 453 (1935), cited by Prof. Borchard, see note 20.

³⁰ For more detailed historical observations, see also David M. Levitan, *Executive Agreements: a Study of the Executive in the Control of the Foreign Relations of the United States*, 35 Ill. L. Rev. 365 (1940).

³¹ Borchard, *op. cit.*, note 20, on p. 637.

The necessity of executive agreements was emphasized by Hackworth.³² In enumerating the usual subjects of executive agreements, he mentioned the inspection of vessels, navigation dues, income tax on shipping profits, admission of civil aircraft, customs matters and commercial relations generally, international claims, postal matters, registration of trademarks and copyrights, etc.

Some executive agreements are entered into according to a congressional authorization, in conformity with a clearly established policy of Congress (tariff acts); some in pursuance of a specific act of Congress; and others without any previous action of the Legislature. On occasion, more important executive agreements have been submitted, after their conclusion, to the Congress, for information and approval expressed by joint resolutions of both Houses. No uniform procedure, however, has been followed.

Many international arrangements of vital importance have been entered into by the means of executive agreements.³³ The treaty between the United States and the Republic of Texas, signed in 1844, and providing for the annexation of the Republic, was rejected by the Senate. The following year, however, Texas was admitted into the United States by a joint resolution approving the same arrangement as an executive agreement. Such action required only a simple majority of both Houses.³⁴ The case of Hawaii was similar.³⁵

Among other more important international arrangements entered into by executive agreements, are the armistices of 1898, 1918, 1943 and 1945, as well as other arrangements made under the President's power as Commander in Chief of the United States armed forces.

B. Recent American Developments

The development of all means of communication, the ever closer international intercourse and the growing scope of matters which interest the international community, demand a simplification of the treaty making process and quick action of the Executive. The question was being raised whether the senatorial procedure of treaty making should not give way to a method better adapted to the necessities of modern life.³⁶

Much has been spoken and written about the international trade arrangements entered into by the United States by the means of executive agreements in pursuance of the Reciprocal Trade Agreements Act of

³² V Digest of International Law 397 (1940-1944).

³³ Many examples are given by D. M. Levitan, *Executive Agreements*, 35 Ill. L. Rev. 365 (1940).

³⁴ J. B. Moore, I Digest of International Law 453-456 (1906); S. B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* (1904), 95-99.

³⁵ I Moore's Digest 503-520; CRANDALL, *op. cit.*, note 34, p. 97.

³⁶ Some of the articles dealing with this question have been written by Catudal, 10 Geo. Wash. L. Rev. 653 (1942); Quincy Wright, 38 Am. J. Int'l L. 643 (1944).

1934.³⁷ It has been generally recognized that where the policy of Congress has been clearly established, the Executive may enter into executive agreements in furtherance of this policy.³⁸

The case of the St. Lawrence Waterway and Power Project is famous. Its history is most interesting and involves many questions connected with the possibility of avoiding the treaty making procedure by entering into executive agreements.³⁹

The Project, embodied in the form of a treaty with Canada, was submitted to the Senate for its consent in 1932, but was rejected on March 14, 1934. The efforts of the government to get the approval of the Project under the form of an executive agreement by a joint resolution was also unsuccessful. At last, after many changes and 22 years of prolonged discussions, it seems that the project has chances to be realized.

The method of transferring property of the United States to Panama by executive agreement (in 1943) also was subject to question.⁴⁰ It was stated, by Senator Connally, that the arrangement did not involve any permanent obligation of the United States,⁴¹ but the generosity of the United States Government's action made Prof. Briggs state that the arrangement was at the very borderline between a treaty and an executive agreement.⁴²

The Oil agreement with Great Britain was submitted by the Government to the Congress as an executive agreement, but was returned to be entered as a treaty.⁴³ The membership of the United States in international organizations has usually been provided for by executive agreements.⁴⁴ The participation of the United States in the Universal Postal Union was decided by an act of Congress of 1872.⁴⁵

The joining of the International Labor Organization was authorized by joint resolutions in 1934,⁴⁶ and in 1947.⁴⁷ It was stressed that the

³⁷ See, for instance, V HACKWORTH'S DIGEST 425, and Sayre, *The Constitutionality of the Trade Agreements Act*, 39 Col. L. Rev. 751 (1939).

³⁸ The Act authorized the President "to enter into trade agreements with foreign governments," (48 Stat. 943); during the subsequent Congressional debates, the short term character of these agreements was stressed; Sen. Rep. No. 111, 75 Congr., 1st sess., 4 (1937).

³⁹ See e.g., E. Borchard, *The St. Lawrence Waterway Project*, 43 Am. J. Int'l L. 411 (1949).

⁴⁰ See e.g., L. H. Woolsey, *Executive Agreement relating to Panama*, 37 Am. J. Int'l L. 482 (1943).

⁴¹ 89 Congr. Rec. 3744ss.

⁴² *Treaties, Executive Agreements and the Panama Joint Resolution of 1943*, 37 Am. Pol. Sci. Rev. 686 (1943).

⁴³ 91 Congr. Rec. 259 (1945).

⁴⁴ See the list established by H. Hart Jones, *Amending the Chicago Convention and its Technical Standards: Can Consent of all Member States be Eliminated?*, 16 J. Air L. 185 (1949).

⁴⁵ 17 Stat. 283.

⁴⁶ 48 Stat. 1182, T. S. 874.

⁴⁷ 62 Stat. 1151.

"membership of the United States would not impose any obligation . . . upon the United States to accept the proposals of that body." The U. N. R. R. A. arrangement⁴⁸ was entered into by executive agreement and approved by a joint resolution in 1944.⁴⁹

The absence of any commitment binding upon the United States was stressed during the debates on the Food and Agricultural Organization joined by the United States by an executive agreement pursuant to a joint resolution.⁵⁰ The Bretton Woods Agreements, establishing the International Monetary Fund and the International Bank for Reconstruction and Development, concluded in 1944, are certainly among the most important executive agreements ever entered into by the United States. The Department of State argued that as the United States may withdraw from the arrangements at any time, they do not need to be concluded by treaties.⁵¹ An act to provide for the participation of the United States in these organizations was passed by Congress.⁵²

Similar arguments were advanced in providing for the United States membership, by executive agreements, in the U. N. E. S. C. O.,⁵³ the International Refugees Organization,⁵⁴ and the World Health Organization.⁵⁵ The joining of the International Trade Organization, by executive agreement, was sent to Congress for approval.⁵⁶

Unlike the foregoing, the acceptance of the United Nations Organization Charter with the Statute of the International Court of Justice was accomplished by the treaty procedure because of the importance and the permanent character of the obligations imposed by the Charter.⁵⁷

Certainly, the treaty procedure would have had to have been followed even if the "Connally Resolution" had not been passed by the Senate. The resolution concerned the "establishment and maintenance of international authorities with power to prevent aggression and to preserve the peace of the world," and intended to assure the prerogatives of the Senate, providing that "any treaty made to effect the purposes of this resolution . . . shall be made only by the advice and consent of the Senate."⁵⁸

⁴⁸ 57 Stat. 1164.

⁴⁹ 58 Stat. 122.

⁵⁰ 59 Stat. 529.

⁵¹ Hearings before the Senate Committee on Banking and Currency, 79 Congr. 529, 556 (1945).

⁵² 59 Stat. 512.

⁵³ Joint Resolution of July 30, 1946.

⁵⁴ Joint Resolution of July 1, 1947.

⁵⁵ Joint Resolution of June 14, 1948.

⁵⁶ Transmitted to Congress on April 28, 1949, then withdrawn.

⁵⁷ In connection with this question, see EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944).

⁵⁸ Resolution of Nov. 5, 1943, No. 192, 78 Congr., 1st Session; Congr. Rec. 9222 (1943).

The Charter of the United Nations was ratified as a treaty on August 8, 1945.⁵⁹ The United Nations Participation Act,⁶⁰ which was subsequently enacted by both Houses of Congress, did no more than "give effect to existing treaty obligations."⁶¹ The Inter-American Treaty of Mutual Assistance of 1947 and the North Atlantic Defense Treaty of 1949, were entered into by the United States by treaties, thereby following the Connally Resolutions.

Besides the United Nations Organization, the only international organization joined by a treaty was the International Civil Aviation Organization. This treaty, however, the Convention of December 7, 1944, establishing the I. C. A. O., had much broader aims than to provide just for the birth of the organization; it layed the grounds for international air law principles.

Some questions were raised in connection with the executive agreement entered into by the United States and the United Nations Organization,⁶² providing for the establishment of the headquarters of the Organization in New York. It has been generally admitted, however, that the joint resolution "authorizing the President to bring into effect" this agreement⁶³ purported only to implement articles 104 and 105 of the United Nations Organization Charter,⁶⁴ and therefore no treaty procedure was necessary.

C. The Theory of Interchangeability⁶⁵

In recent years a theory has been advanced that treaties and executive agreements are interchangeable and that the Executive is free to enter into international arrangements by either means. The most far-reaching ideas have been expressed by McClure, who asserted that the Senate's treaty making power should be abandoned, except for unimportant, non-controversial matters, and that "the President can do by executive agreements, anything that he can do by treaties, provided Congress by law cooperates, and there is a very wide field of action in which the cooperation of Congress is not necessary". "(T)here is nothing that can be done by treaty that cannot be done by Congress-

⁵⁹ 59 Stat. 1031.

⁶⁰ 59 Stat. 619.

⁶¹ Sen. Rep. No. 717, 79 Congr., 1st session, 7 (1945).

⁶² See e. g., J. O. Murdock, *Constitutionality of a Treaty or an Executive Agreement with the United Nations to Establish the "World Capital" in the United States*, 15 Geo. Wash. L. Rev. 175 (1947).

⁶³ 61 Stat. 758.

⁶⁴ 61 Stat. 756.

⁶⁵ Besides the bibliography mentioned in other notes, the treaties-executive agreements problem is dealt with in the following articles: John S. Dickey, *Our Treaty Procedure Versus our Foreign Policies*, 25 For. Affs. 357 (1947); H. S. Fraser, *Constitutional Scope of Treaties and Executive Agreements*, 31 A. B. A. J. 286 (1945); 68 N. Y. S. B. A. 175 (1945); *Analysis of Treaties and Executive Agreements*, prepared for the Committee on Foreign Relations, Sen. Doc. No. 244, 78 Congr., 2d session (1944).

confirmed executive agreement.”⁶⁶

The approach of Hackworth is similar. During the hearings before the Senate Committee on Commerce, he asserted that except where the international arrangement dealt with a matter not delegated by the States to the Congress, the Executive could decide whether they had to be done by treaties or executive agreements.⁶⁷ These ideas were further developed by McDougal and Lans.⁶⁸ Some proponents of this theory assert that executive agreements should be submitted to the Congress for its consent only where appropriations are necessary.

It does not seem, however, that this point of view is acceptable. It is obvious that the use of executive agreements is much more essential in modern times than formerly. It may be argued that expediency requires the elimination of the treaty procedure from the American practice. It is evident, however, that as long as the Constitution is not amended, this cannot be properly done.

It is perfectly permissible to give a very broad meaning to the term “executive agreement,” and to limit the term “treaty.” But the distinction cannot be abolished, and each of these international agreements must be entered into in accordance with the supreme law of the United States. The argument that inasmuch as the Congress is entitled to regulate the interstate and foreign commerce, it may withhold from the Senate its treaty prerogatives in every case where the international arrangement deals with commercial matters, also seems to be going too far.

The theory of interchangeability was severely criticized by the defenders of the Senate’s treaty making power, such as Borchard.⁶⁹ And even some authors who suggested to amend the Constitution oppose the resort to executive agreements in every case, as it would amount to the violation of the Constitution as long as its provisions are not changed. Thus, Prof. Colegrove correctly writes that “the use of executive agreements as a substitute for a peace settlement is a palpable evasion” of the Constitution, which “cannot do otherwise than to breed a contempt for law that is dangerous for democratic institutions.”⁷⁰

D. Executive Agreements Before the Courts

Until the *Colonial Airlines* case,⁷¹ no court has ever been asked directly to pass upon the validity of an executive agreement on the ground

⁶⁶ INTERNATIONAL EXECUTIVE AGREEMENTS, 363, 378; reviewed by the author in 42 Col. L. Rev. 887 (1942).

⁶⁷ Hearings, S. 1384, 78 Congr., 2d Session, 15, 264, 270 (1944).

⁶⁸ *Treaties and Congressional Executive or Presidential Agreements; Interchangeable Instruments of National Policy*, 54 Yale L. J. 181-351, 534-615 (1945).

⁶⁹ Besides other articles, see the reply to McDougal and Lans, 54 Yale L. J. 616 (1945).

⁷⁰ THE AMERICAN SENATE AND WORLD PEACE (1944), 110.

⁷¹ *Colonial Airlines, Inc. v. Adams*, 87 F. Supp. 242 (D. D. C. 1949); see R. R. Hackford, *The Colonial Airlines Challenge to U. S. Canadian Transport Agreement*, 19

that the arrangement should be concluded by the treaty procedure. On many occasions, however, the courts have stressed that the scope of the power of the Executive in all matters connected with the foreign relations of the United States is very broad.

The lawfulness of the very resort to executive agreements was emphasized by the courts in several cases, such as *Field v. Clark*⁷² and *United States v. Curtiss-Wright Export Corp.*,⁷³ where Justice Sutherland stated, as a dictum, that "the power to make such international agreements as do not constitute treaties in the constitutional sense . . . exists as inherently inseparable from the conception of nationality."

According to well settled practice, the courts refuse to interfere with the action of the Executive in the field of international relations. Thus, in the *Curtiss-Wright* case, it was said: "In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations'. Annals, 6th Cong., col. 613."⁷⁴

In *United States v. Belmont*⁷⁵ the Court asserted that the "governmental power over external affairs is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government An international compact . . . is not always a treaty which requires the participation of the Senate Plainly, the external powers of the United States are to be exercised without regard to state laws and policies. The supremacy of a treaty in this respect has been recognized from the beginning And . . . the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government"

The *Pink* case⁷⁶ was similar, and it involved the same executive agreement with Russia, effected by an exchange of notes, which was interpreted to have as much force as a treaty so as to prevail over the laws of the State of New York.

J. Air L. 1 (1952); O. G. Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 J. Air L. 436 (1950), 18 J. Air L. 12 (1951); W. J. Wagner, *The Colonial Airlines Case: Treaties and Executive Agreements Relating to Aviation*, Wash. U. L. Q. 211 (1952).

⁷² 143 U. S. 649 (1892).

⁷³ 299 U. S. 304, 318, (1936).

⁷⁴ *Ibid.*, on p. 319.

⁷⁵ 301 U. S. 324, 330-331 (1937).

⁷⁶ *United States v. Pink*, 315 U. S. 203 (1942).

The recent *Colonial Airlines* case⁷⁷ which so squarely presented the question of the extent of the Executive's power to conclude executive agreements did not add anything new, as the complaint was dismissed without any discussion of its merits, on the ground that the plaintiff attempted to sue the United States, a sovereign, without its consent.

III. CONCLUSION

As pointed out earlier, the constitutions of independent nations usually classify their international commitments, and require for some specified categories of international arrangements the consent of the legislature. In the United States, the problem is much more complicated.

Some jurists have attempted to base the classification between treaties and executive agreements on various considerations, such as opinions of recognized authorities (e.g., the Founders) and Congressional debates. Mostly, they apply the empirical approach, and, instead of making their deductions from the Constitution and the whole system of American Law as to what international arrangements should be entered into by treaties and what by executive agreements, they examine the arrangements already concluded and try to establish what the difference between the two types of international arrangements is.

This method, appropriate for discovering what practice has been followed, cannot cope, however, with the problem in its entirety and should be supplemented by considerations based upon the meaning of the Constitution. The classification based upon the difference discovered by the approach *a posteriori* does not prove to be satisfactory.

Thus, not all the differences between treaties and executive agreements which have been pointed out are clearly established or important enough to entitle us to assume that if an international arrangement has one or more characteristics of a treaty, it must be considered as requiring the two-thirds consent of the Senate to be entered into. It is rather the sum of all the characteristics of the arrangement, which must determine whether it can be concluded as an executive agreement or not. In borderline cases, the precedents in the field of the subject matter of the international arrangement may be of some help in reaching the decision. The ancillary argument of expediency, necessity of a speedy expedition of the matter, and requirements of modern international relations may be also admitted, although it is vague.

In any case, the importance of the distinction concerns only the American domestic law, as executive agreements and treaties are equally binding upon the United States from the international standpoint. Execu-

⁷⁷ See note 71.

tive agreements are binding not only upon the administration which concluded them, but upon subsequent administrations as well; the history of the "Rush-Bagot" Agreement of 1817, which remained in force irrespective of the changes of government, and many other examples are given by Levitan.⁷⁸

The first general observation that may be drawn from the comparison of the treaties and executive agreements which the United States entered into, is that treaties regulate usually more important matters than executive agreements.

It may be mentioned also, that while executive agreements are self-executing, as a rule, treaties may or may not be self-executing. Usually, executive agreements do not require appropriations and do not assume any continued obligations of the United States for the future.

Another difference involves the relation of the international arrangement to the general principles of American policy. In general, a treaty may be contrary to the previously settled foundations of the policy of Congress, whereas, executive agreements conform with and carry out the established principles. But of course, many treaties do not depart from the general policies of the United States, while some executive agreements do just that. Obviously, the executive agreement concluded by an exchange of notes with Soviet Russia, recognizing the U. S. S. R. government, involved a complete change of the American policy toward that country. However, if the "policy" is formulated in terms of some legislative enactment, it becomes a law of the land having a much more stable character, binding upon the Executive.

The distinction based on the number of the contracting parties is never conclusive. Most multilateral international arrangements were entered into by the United States by treaties; but there are examples to the contrary. For instance, the Transit and the Transport Air Agreements of 1944 were entered into by executive agreements. On the other hand, many bilateral arrangements were concluded by treaties.

It is sometimes contended that executive agreements do not remain in force as long as treaties. In many cases this is correct. Often, however, the length of the life of a treaty is strictly determined in the very instrument, or terminated sooner or later by some action of a contracting party. There are no everlasting treaties. On the other hand, many executive agreements have lasted for many years (e. g. the "Rush-Bagot" Agreement remained in force for about half a century) and the obligations that they impose cannot be unilaterally terminated or denounced by a contracting party.

It is not correct to say that executive agreements never involve any

⁷⁸ See note 33.

continuing international commitments on the part of the country. Every international arrangement establishes a rule or some rules which are binding upon the parties. In some cases, the commitments may be extensive; in others, the agreement may impose nearly no obligations. Obligations always exist, however, in treaties as well as in executive agreements, although they may be vague and not require any action, as for instance in some general declarations of friendship not to assume any inimical attitude toward the other party.

It seems that more definite conclusions may be drawn from the very provisions of the Constitution and their interpretation.

The relation between treaties and federal laws was not expressly settled by the Constitution itself. It is now firmly established, however, that the legislative system of the United States includes four distinct levels: (1) The Constitution of the United States (2) Federal laws and international treaties (3) State constitutions (4) State laws. Federal laws and treaties are put by the interpretation of the Constitution on equal footing, the more recent taking precedence over the former.

What about the place of the executive agreements? Neither the Constitution nor its construction by judicial decisions can give us any clear answer.

In a recent treatise, Prof. Crosskey demonstrated that the provisions of the Constitution may be understood in diametrically different ways, and that the judicial construction of many clauses is clearly contrary to their wording and to the meaning they held for the drafters.⁷⁹ Keeping in mind that law is a result of experience rather than of logic, it still seems possible to suggest a logical classification of the international arrangements of the United States which would well fit into the whole constitutional system of the country.

Thus, it is submitted that executive agreements concluded without any participation of the legislature should be placed between the second and third level. While internationally binding upon the United States, they have no constitutional authority in the American domestic system to take precedence over any federal legislative enactment. As an executive measure, they should be in accord with the laws of the country. When contrary to federal laws, they must yield to the internal legislative system and are not binding upon the courts.

On the other hand, the President is vested with the power of conducting the foreign relations of the nation,⁸⁰ being assisted in some cases by the Senate. He must lead the foreign affairs of the Union in the way

⁷⁹ W. W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

⁸⁰ See e.g., EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1919).

which would be the most appropriate for the whole American community. Therefore, the laws of the several states must yield to international arrangements of the United States, even when concluded without any participation of the Senate or of the Congress. The interests of the nation take precedence over those of its component parts.

Thus, it may be said that treaties may change previously enacted American laws, while executive agreements, entered into without the approval of Congress, should comply with them. They may invalidate, however, state laws. The Executive may conclude such executive agreements whenever they are not contrary to federal laws.

What is the position of the executive agreements entered into with approval of the simple majority of Congress?

Some legal scholars maintain that executive agreements are the supreme law of the land just like treaties. This proposition should be limited, however, to executive agreements approved by a joint resolution of both Houses.

When the sanction of Congress to an international arrangement is given, the agreement has the full force of a federal law. Once accepted by legislature, it abrogates the previously enacted laws of the United States which may be inconsistent with its provisions. There is no ground whatever to assert that Congress has more limited powers in approving executive agreements than in enacting laws.

Treaties hold the first rank in the American system of international arrangements. Of course, anything that is done by executive arrangements may be done by treaties. But treaties embrace a still broader scope of matters; the laws of the United States have to be made "in pursuance" of the Constitution, but treaties are made "under the authority of the United States." There is no matter which could not be regulated by an international treaty of the United States. By express provisions of the Constitution, the states are barred from direct participation in international life. The conclusion of treaties on behalf of the whole nation has been vested in the President, assisted in some cases by the Senate.

This power is exclusive and complete. The Senate represents the interests of the several states. If the President finds, and two-thirds of the Senators present concur, that it lies in the interests of the nation to enter into any kind of treaty, there cannot be any limitation imposed upon the exercise of this power. This principle, logical and necessary for the welfare, development and international prestige of the United States, is more and more frequently accepted by the courts. Thus, in *Missouri v. Holland*⁸¹ the court said: "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act

⁸¹ 252 U. S. 416 (1920).

of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring nation action, 'a power which must belong to and somewhere to reside in every civilized government' is not to be found."

From the words "it is not lightly to be assumed" it may be inferred that in some case the Court would limit the treaty making power of the Federal Government. However, it did not settle any borderline, which was attempted in a previous opinion of the Court in *Geofrey v. Riggs*.⁸² Speaking for the Court, Mr. Justice Field said: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear;" and the Court tried to establish what subjects were not "proper subjects of negotiation" by saying: "The treaty power, as expressed by the Constitution, is . . . unlimited except by those restraints which are found in that instrument . . . and those arising from the nature of the government itself and that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . ."

In some recent cases, the Court seems to go even farther in rejecting any limitation upon the Government. Thus, in *United States v. Curtiss-Wright Export Corporation*,⁸³ the court said that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. . . . As member of the family of nations, the rights and powers of the United States in that field are equal to the rights and powers of the other members of the international family. Otherwise, the United States is not completely sovereign."

Unfortunately, some jurists negative this doctrine by holding that there are "reserved powers" of the states which cannot be dealt with by the nation's treaties. Such interpretation makes a "cripple" of the United States in the field of international relations, to repeat the words of Prof. Dickinson.⁸⁴ Since the several states cannot enter into any kind of international arrangements, and there are to be some matters "reserved" to the states and thus remaining outside of the scope of the nation's power, a lacuna is obviously created which apparently cannot be filled. All the discussions relating to the question of whether the United States may enter into the genocide convention and into the human rights convention are unnecessary and prejudicial to the interests and prestige of the nation.

⁸² 133 U. S. 258, 266 (1890).

⁸³ 299 U. S. 304, 318 (1936).

⁸⁴ Lecture delivered at Northwestern Univ. on Feb. 24, 1950.